IN THE HIGH COURT OF JUDICATURE
AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL (ST) NO. 11600 OF 2007
IN
B.C.C. L.C.SUIT NO. 5632 OF 2001

Ashok Nandu Shetty
Residing at B/395, M.H.B.Colony
Sardar Nagar No.1, Sion-Koliwada, Mumbai ...Appellant
Vs.
The Municipal Corpn. Of Gr. Mumbai
and Anr. ...Respondents

Mr.J.J.Sha , Advocate for Appellant
Ms.Nisha Dabhade, Advocate for Respondent (BMC)

CORAM: SMT.ROSHAN DALVI,J.
DATED: 7TH JUNE, 2007

ORAL JUDGMENT

1. The Appeal challenges the judgment dated 12th April, 2007 by the Bombay City Civil and Sessions Court in Suit No.5632 of 2001, under which the Appellant/Plaintiff's Suit for protection of the suit structure is dismissed. The Appellant/Plaintiff has been issued notice under Section 351 of the B.M.C. Act in 2001. The notice is for shop admeasuring 7'-0" x 7'-11" (approximately 8 ft.). The

structure is described as a shop in the notice. The structure is stated to be in the compulsory open space which has a rolling shutter and G.I. Sheets. The Appellant has produced photographs of the suit structure. The photographs show the description as in the notice. The structure is indeed a shop. It is in the compulsory open space. It has G.I. Sheet roof and rolling shutters. It is adjoining the wall of the building Dev Chhaya.

2. The Appellant/Plaintiff contends that he was issued an earlier notice dated 22nd August, 1986 for the same structure also under Section 351 of the B.M.C. Act. The structure under that notice was regularised upon he filing a Suit in 1986 and the DMC of the BMC passing an order thereon. That contention is absolutely incorrect.

3. The earlier notice was for a Pan Shop admeasuring 7 ft. x 5 ft. The Pan Shop was regularised. The present notice is for a shop. No shop has been regularised. The dimensions of the suit shop are larger. The construction is different. It is in the compulsory open space of the Dev Chhaya Building, (Vasant Nivas), Dr. M.B. Raut Road, Shivaji Park, Dadar, Bombay- 400 028. The Appellant's contention that the same structure is sought to be demolished is incorrect.

4. Upon these facts the impugned judgment has to be considered.

5. The Appellant's Advocate contends that no written statement of the BMC was filed and no evidence is led. The Appellant must prove the existence of his legal right to protection of the suit structure independently as a plaintiff in the Suit. The absence of the written statement does not matter. The case has to be considered upon the facts produced by the Appellant/Plaintiff. Upon such facts it is seen that the structure which was regularised and which was a Pan Shop is no longer in existence. Another structure of larger dimensions has come up. That is not a regularised structure. It is not constructed with the permission of the Planning Authority. The learned Judge has considered this aspect based upon the admission of the Plaintiff himself. In his cross examination which forms part of para 18 of the Judgment. The learned Judge has considered the description of the property, as well as the fact that it is in the compulsory open space where no structure can be constructed. The learned Judge has also considered the license under the Shops and Establishment Act produced by the Plaintiff of the year 1987 and correctly held that it does not pertain to the shop for which the impugned notice is given. The Appellant/Plaintiff has not proved the

authorisation or toleration of the suit structure. Hence, the Suit is rightly dismissed. Based upon the Appellant's own contentions and documents as well as the photograph now produced before the Court which shows the shop as described in the notice the Appeal cannot be sustained. Appeal is dismissed under the provision of Order 41 Rule 11 (1) of the C.P.C.

6. One photograph signed by the Appellant's Advocate taken on record. Another photograph signed by the Appellant's Advocate is given to the Respondent's Advocate.

(SMT. ROSHAN DALVI, J.)